

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY A. MCELWAIN

Claimant

VS.

EMERITUS CORPORATION (LIBERAL SPRINGS)

Respondent

AND

**INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA**

Insurance Carrier

Docket No. 1,035,190

ORDER

Respondent and its insurance carrier (respondent) appealed the August 29, 2007, Order for Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

Claimant alleges she injured her neck on May 4, 2007, while putting away inventory in respondent's kitchen. In the August 29, 2007, preliminary hearing Order, Judge Fuller found this claim compensable and granted claimant's request for both temporary total disability benefits and medical benefits. The Order reads, in part:

[It is found] [t]hat the claimant gave timely notice of her accidental injury. The claimant and Janet Mongold had clear recollection of the date of injury and the conversation between the claimant and her supervisor, Jessica Kester. Ms. Kester received verbal notice of the injury just shortly after it occurred. It is further found that the claimant's injury either arose out of and in the course of her employment or was aggravated by the reported accident. The claimant reported immediate onset of pain in her shoulder and neck area after the lifting incident at work. The medical records indicate that there is a possible non union of an old fracture as well as some disc protrusions.

Respondent contends Judge Fuller erred. Respondent requests the Board to reverse the August 29, 2007, Order on the basis claimant failed to prove she injured her

neck at work and also that claimant failed to prove she provided respondent with timely notice of the alleged accident.

Conversely, claimant argues the Board should affirm the Order.

The only issues before the Board on this appeal are:

1. Did claimant injure or aggravate her neck working for respondent?
2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in January 2007 as a dietary aide and assistant cook. Claimant alleges she injured her neck on May 4, 2007, while putting away inventory in respondent's kitchen. According to claimant, she felt something snap and experienced a burning sensation in the area of the left side of her neck and left shoulder when she turned to set a case of canned fruit on a table. Claimant testified the incident occurred between approximately 9 and 10 a.m.

Claimant also testified she was working alongside a co-worker, Janet Mongold, at the time of the incident. At her July 18, 2007, deposition, claimant testified the head cook (Barbara Simmons), claimant's supervisor (Jessica Kester), and a newly-hired employee were also in the kitchen at the time of the incident.¹ But at the August 3, 2007, preliminary hearing, claimant could not recall if Ms. Kester was in the kitchen at the time of the alleged incident.²

According to claimant, she immediately told Ms. Mongold about the incident regarding her neck and shoulder and about needing a break. Moreover, claimant testified the same day she told her supervisor, Ms. Kester, about the incident and about needing help with her catering duties. Claimant testified Ms. Kester responded by saying that claimant should work through her symptoms or claimant would miss work for three days because of respondent's drug testing policies. Claimant testified, in part:

¹ McElwain Depo. at 16.

² P.H. Trans. at 9.

Q. (Mr. Weltz) Okay. When you told Jessica that you were having this pain in the area that you've described, did you say that it happened while you were moving the inventory?

A. (Claimant) Yes.

Q. Okay. Did she have any suggestion for what you were to do?

A. Yes.

Q. Okay. Can you tell me what that was?

A. She basically told me that their policy was for me to be off three days, because they send you to the hospital for drug test breathalyzer and all that. "And you have to work this weekend, so you just need to suck it up and be here to work."³

Despite her neck and shoulder symptoms, claimant continued working. Claimant believes she was injured on Friday and the following two days she worked as the head cook. And as the head cook, she prepared both breakfast and lunch on those days. It was about that time claimant noticed she was beginning to experience pain into her left hand and her little and ring fingers were going numb.

Monday, May 7, 2007, was claimant's day off and she sought treatment with her chiropractor, Dr. Streiff, for severe pain about her neck and left shoulder. According to claimant, she told Dr. Streiff about the pain she experienced while putting away inventory at work. The doctor's notes that were presented at the preliminary hearing, however, do not contain any sort of history. The doctor treated claimant on both Monday and Tuesday and restricted claimant from working for two days.

By Wednesday, May 9, 2007, claimant was experiencing excruciating pain and she decided to consult someone other than a chiropractor. Accordingly, claimant called her husband and asked him to take her to the Southwest Medical Center's emergency room in Liberal, Kansas. Claimant testified she slipped going down some stairs while waiting for her husband to take her to the medical center. She described the incident, as follows:

I was waiting for Chris to come get me and I just took down a load of -- a small laundry basket full of a few towels I was going to start in the washer before he took me, because I had no idea that I was going to be Life Watched to Wichita. And I

³ McElwain Depo. at 23, 24.

was going down the stairs and I slipped on the second step. And, I didn't fall; I just slipped and sat down on my rear end.⁴

Claimant denies the incident on the stairs affected her symptoms. The emergency room records, however, contain a history that claimant's chief complaint was left neck pain from falling down three to four stairs at home the day before.⁵

From the Liberal, Kansas, emergency room claimant was flown to Wesley Medical Center in Wichita, Kansas, for a suspected odontoid fracture, which claimant believed was different from the compressed fracture she sustained in her upper neck in an automobile accident approximately 10 or 15 years ago. Claimant acknowledged following that automobile accident she received chiropractic treatment two or three times per year for pain in the middle of her back and headaches.

The history recorded at the Wesley Medical Center also indicates that claimant related her neck complaints to a fall at home the prior evening. Those notes, which are dated May 9, 2007, read in pertinent part:

The patient is a 36-year-old female who was transported to the Wesley Medical Center Emergency Room from the hospital in Liberal, Kansas as Level II Trauma. The patient reports falling on stairs last evening. Mechanism of fall was backwards, landing on her upper back first. The patient denies loss of consciousness or striking her head at this time. The patient immediately got up from the stairs and soon experienced increasing pain and stiffness of her upper back and left lower neck. The patient reports this neck pain is a chronic problem she has had for many years, but her neck was much more stiff this time. She slept poorly last night and awoke with severe pain in the same region. Her husband convinced her to visit the emergency room in Liberal for evaluation.

. . . .

Chronic neck pain since a motor vehicle accident nearly 10 years ago. The patient reports she had a neck vertebrae compression at that time with no subsequent surgeries. Since that time, the patient has been treated with chiropractic manipulation. Her last treatment was last Tuesday.⁶

⁴ *Id.* at 40.

⁵ P.H. Trans., Resp. Ex. 1 (Southwest Medical Center records).

⁶ *Id.*, Resp. Ex. 1 (Wesley Medical Center records).

A trauma surgeon at Wesley Medical Center ruled out a fractured odontoid but suspected a nonunion of the odontoid process, which is a congenital malformation. Wesley Medical Center discharged claimant and advised her to follow up with a neurosurgeon the next morning.

On May 22, 2007, claimant was examined by Dr. John P. Gorecki. Claimant advised Dr. Gorecki the history in her chart was not accurate as she developed the sharp pain in her neck and into her left arm at work after holding a heavy object and twisting. Dr. Gorecki's May 22, 2007, records note the following, in part:

This 36 year-old right handed female seen in neurosurgery consultation at the request of Dr. Harrison. She was apparently injured on the job, May 4, 2007. She indicates that the description in the chart is not accurate. She was holding a heavy object, twisting and developed sudden sharp pain radiating from her neck down into her left arm. Since that time, she describes numbness in the ring and little finger. She also describes severe, sharp, constant pain at the upper portion of her cervical spine.⁷

Based upon a CT scan, Dr. Gorecki suspected a nonunion of an old odontoid fracture, which might be related to the earlier automobile accident. The doctor's notes indicate a fusion at C1-2 may be appropriate.

There is additional confusion regarding the history of claimant's neck and arm symptoms. Jessica Kester, who is respondent's dining services director and the supervisor over the kitchen area where claimant worked, at the preliminary hearing disputed that claimant reported an injury to her on May 4, 2007. Ms. Kester also questioned that claimant would have been putting away inventory on that day as it was a Friday and it is more likely the inventory would have been put away on Thursday. Ms. Kester did confirm, however, that workers are taken off work for three days pending the results of drug testing when they report work injuries. Moreover, Ms. Kester testified how claimant had previously missed three days of work for drug testing due to a "little bitty cut" on her finger.⁸ According to Ms. Kester, she did not learn claimant was alleging a work injury until sometime after respondent received a June 6, 2007, letter from claimant's attorney.

The executive director of the facility where claimant worked, Karrie Ipson, also testified at the preliminary hearing. She testified she became aware that claimant was having neck and shoulder problems on May 7, 2007, when claimant's husband brought in the off-work slip from the chiropractor. Ms. Ipson testified claimant's husband said

⁷ *Id.*, Resp. Ex. 1 (Wichita Surgical Specialists, P.A. records).

⁸ P.H. Trans. at 26.

claimant “had injured herself at home playing with the children.”⁹ On May 9, 2007, respondent placed claimant on six weeks of unpaid personal leave. Although claimant’s husband was present at the preliminary hearing, he did not testify to contradict Ms. Ipson’s statements. Claimant, however, testified that only one child lives at home and she is eight years old.

Following the preliminary hearing, claimant took the deposition of former co-worker Janet Mongold. Ms. Mongold recalls putting away food supplies with claimant on either May 3 or 4, 2007, and that claimant complained of hurting herself after lifting a box of hamburger. Ms. Mongold testified, in part:

I remember her -- it was a box full of meat. It was rolls of hamburger from -- if I can remember right -- not guessing. And she had lifted it up. We had lifted up over two counters to get it over to the freezer to put it in the freezer. And I remember her saying that she hurt herself. We all went back to work and doing things, you know. Because the same day, I hurt my arm by unloading a box of bananas. At that time, Mary [claimant] kept saying the whole time it kept hurting. I figured she had pulled a muscle. You know how you lift up something and your neck just don’t want to go, or your arms don’t want to go where your neck goes? And she complained then of it hurting her.¹⁰

Moreover, Ms. Mongold also confirmed claimant reported to Ms. Kester about hurting herself putting away food supplies the day the injury occurred and that Ms. Kester told claimant to “Suck it up. You’ve got to work this weekend.”¹¹ Finally, Ms. Mongold also testified that claimant was in a lot of pain and, therefore, Ms. Mongold did not know how claimant would have worked that weekend without assistance.

In early May 2007, respondent terminated Ms. Mongold for allegedly failing to notify a supervisor before leaving work due to a health condition.

After the preliminary hearing, respondent took the deposition of Barbara Simmons, who was the lead cook at the time of claimant’s alleged injury and who worked alongside claimant on the day of the alleged accident. Ms. Simmons testified she helped claimant and Ms. Mongold put away the food supplies on the day in question. But Ms. Simmons denies hearing claimant complain of hurting herself that day and denies that claimant’s work pace slowed.

⁹ *Id.* at 33.

¹⁰ Mongold Depo. at 6, 7.

¹¹ *Id.* at 7.

This claim presents a rather difficult dilemma. Claimant's testimony, if true, establishes that she experienced pain in her neck and left shoulder while putting away food supplies at work and that she promptly reported the incident to her supervisor. Other evidence, however, provides an entirely different history of claimant injuring her neck either from slipping on stairs or playing with her children. In addition, respondent has presented testimony contradicting claimant's testimony about providing Ms. Kester prompt notice of the incident.

Claimant offered an explanation of the contradicting medical records by testifying she was in intense pain and under narcotic medications while at the Southwest Medical Center and Wesley Medical Center.

Judge Fuller was persuaded by claimant's testimony and that of Ms. Mongold. Accordingly, the Judge granted claimant's request for preliminary hearing benefits. Although determining the truth in this claim is difficult, at this juncture the record establishes that claimant sought chiropractic treatment and was taken off work on May 7, 2007, before she would have slipped on the stairs. That supports claimant's testimony that the slip on the stairs did not affect her symptoms. The Judge found claimant's testimony credible. This Board Member, by the barest of margins, agrees. Accordingly, claimant's and Ms. Mongold's testimonies establish it is more probably true than not that claimant injured her neck at work on or about May 3 or 4, 2007, and that claimant provided respondent notice on the date the injury occurred. In short, the August 29, 2007, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the August 29, 2007, Order for Compensation.

IT IS SO ORDERED.

¹² K.S.A. 44-534a.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge